In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

vs.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

This reply brief is submitted in order to correct certain misapprehensions apparent in appellees' brief.

ARGUMENT

I

FEDERAL ABSTENTION IS REQUIRED

The appellee at once asserts that the abstention argument was not presented to the district court but

that, even if it was, it was done in a "short and half-hearted" manner (Appellees' Br. at 15, n. 8).

This argument ignores the opinion of the three-judge court at 354 F.Supp. 1092, 1094-1095 (N.D. Cal. 1973) which considers the abstention argument at some length and rejects it and the dismissal by the district court of Count II of the original complaint because it had been rendered moot by the California Supreme Court decision in *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972), which interpreted California Penal Code section 2600.

Appellee then argues that California Penal Code section 2600 is not fairly subject to a construction which would modify or avoid the constitutional question. This section in pertinent part reads:

> "Pursuant to the provisions *of this section*, prison authorities shall have the authority to exclude obscene publications or writings, *and mail* containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. Nothing in this section shall be construed as limiting the right of prison authorities (i) to open and inspect any and all packages received by an inmate and (ii) to establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his cell or elsewhere in the prison at one time." (Emphasis added.)

We submit that a California court could indeed fairly interpret this statute so as to give the cor-

rectional authorities power to censor mail only to exclude "obscene publications or writings" or material "tending to incite murder, arson, riot, violent racism, or any other form of violence" and "gambling or a lottery." If so, this would render the present argument concerning Director's Rule D 1201 forbidding "magnifying grievances" and "unduly complaining" totally moot because that regulation as applied to mail would be statutorily unauthorized.

Appellee further complains that there is no comparable state remedy because the great writ of habeas corpus is used to attack prison conditions in California. See *In re Harrell,* 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970), and *In re Jordan,* 7 Cal.3d 930, 103 Cal. Rptr. 849 (1972). This seems to be contradictory to appellees' position at page 18 where, by their own admission, they advised the district court to abstain presumably because there was a comparable state remedy. Moreover, the remedy of habeas corpus, combined with that of mandate, has a far wider application in California than appellees are apparently aware. See *Reaves v. Superior Court,* 22 Cal.App.3d 587, 99 Cal.Rptr. 156 (1971).

Finally, appellees argue it is too late to order abstention; in effect the harm has been done and without complaint from appellants. This is not so. Appellants did apply unsuccessfully for a stay from all levels of the federal courts, but the friction continues as long as the federal district court maintains close and direct supervision of the state correctional system.

II

THE MAIL REGULATIONS ARE NOT OF FEDERAL CONSTITUTIONAL DIMENSION

The basic difference between appellants and appellees is in their respective approaches to the inmate's ability to send social mail. The district court held that a restriction on the ability to send social mail must be justified by either a "compelling interest" or a "reasonable and necessary" state interest. Absent such justification, any restriction on social mail must fail and the proponents of the regulation have the burden of sustaining its validity.[1]

The appellants urge this Court to hold that there is no federal constitutional right in state prison inmates to send social mail. If this is so, there should be no burden on the states to prove justification of their regulations controlling such social mail to federal courts. If there is support for the concept of restriction in any rational system, that is sufficient.[2]

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[1]The district court's "Order Re Proposed New Regulations", filed on May 30, 1973, noted that:

> "The Court believes that in light of the present text of Rule 2401, to wit, 'the sending and receiving of mail is a privilege, not a right . . .' defendants should adopt a statement summarizing the Court's holding in this case in lieu of Rule 2401. The Court suggests the following:
>
> 'Sending and receiving letters is not to be interfered with except that a specific letter may be disapproved if its contents are in violation of the following rules.'" (App. at p. 160)

[2]It may well be that there is great debate on the rehabilitational propriety of the censorship of inmate social mail but this is irrelevant to any federal constitutional question. Accepting as true appellees' statement, ". . . it is as likely that mail censorship impedes rehabilitation as that it furthers it . . . ." Appellees' Brief p. 42, it follows that there is no federal constitutional question at issue.

Of course, concepts of equal protection, cruel and unusual punishment, free exercise of religion, and other specific provisions of the constitution, will all continue to protect the inmate but these do not empower the federal court to declare the limits and purposes of censorship of social mail.[3] The right to send social mail is a "free man's" right and is lost upon a valid felony conviction and sentence of imprisonment. California provides confidential and unrestricted access to courts, legislators, executive officials and to attorneys. Social mail is a matter of prison administration, not federal constitutional right. *Frye v. Henderson,* 474 F.2d 1263 (5th Cir. 1973).

III

THE PARAPROFESSIONAL AND LAW STUDENT REGULATIONS

The appellees claim that new regulations concerning paraprofessional and law school students were voluntarily submitted. (Appellees' Br. at 45.) In this they are mistaken. These actions were taken under orders from the district court and, as has been shown above, stays were sought, albeit unsuccessfully, at all available levels of the federal court system.

The original opinion of the district court delineated the class of persons entitled to confidential interviews with inmates as "bona fide law students under the

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[3]Compare *United States v. Wilson,* 447 F.2d 1, 8 (9th Cir. 1973) (72-3145), coming to diametrically opposed conclusions regarding the "lawful possession" of inmate mail.

supervision of attorneys or full time lay employees of attorneys," 354 F.Supp. at 1099. After further hearings and objection, this was amended to:

> "(3) Law students certified under the State Bar Rules for Practical Training of Law Students and sponsored by the attorney of record or
>
> (4) . . . persons regularly employed by the attorney of record to do legal or quasi-legal research on a full-time basis." (App. at p. 166).

In the final order after yet further argument, this became:

> "(3) Law students certified under the State Bar Rules for Practical Training of Law Students and sponsored by the Attorney of Record, or
>
> (4) legal paraprofessionals certified by the State Bar or other equivalent body and sponsored by the attorney of record." (Supp. to App. pp. 198-199).

The appellants strongly urge that the broad language contained in the published opinion be disapproved. It is the opinion which has precedental value. It is the opinion's language which will be quoted and relied upon.

It is submitted that this Court is the proper body to establish minimum constitutional standards of access to the Courts. It may then require its lower courts to examine whether these minimums have been met in particular cases but once established that they have, and that the state under federal scrutiny is in compliance, we respectfully submit that the federal inquiry should end.

Whether paraprofessionals eventually will contribute materially to the legal representation of all persons including the indigent and inmates is yet an open question. We urge that it is premature for any federal court to hold that the federal constitution requires that this as yet undelineated class be given confidential access to state prison inmates.

IV

THE PROCEDURAL DUE PROCESS REQUIREMENTS

There appears to be much confusion among appellants (App. at 6) regarding the appellate procedures available to inmates. As the appellees properly comment, under the mandate of the federal courts, inmate discipline procedures have been the subject of extensive litigation. See *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971), and subsequent proceedings in the Ninth Circuit Court of Appeals. Different procedures are provided for in the case of other grievances including those involving social mail. These were and are contained in Director's Rule DP 1003 (Supp. to App. at 198). At that time, this rule provided:

> "RIGHT TO ADMINISTRATIVE REVIEW OF GRIEVANCES. Each inmate has the right to appeal decisions or conditions affecting his or her welfare. Each institution head must provide a system whereby an inmate may request and receive administrative review of any problem or complaint. Such review will involve upper level staff and will insure that the complaint receives timely, courteous and con-

> siderate attention. The institutional appeal procedure will apply to all areas of complaint except the disciplinary process and the Adult Authority hearing process, each of which has a special appeal or review procedure."

The appellant urges this Court to hold that the precision and detail of procedural due process requirements, particularly fair-warning, which underlies concepts such as vagueness, be varied according to the nature of the state action taken. Thus all social mail may be read. If lawfully read, it may be lawfully used. It is sufficient if the appellee is notified if any mail thought to be indicative of his rehabilitory progress be placed in his file. Social mail we submit can be rejected if it magnifies grievances or unduly criticizes. It may be that social mail can also form the basis for disciplinary action but when this happens, the protections of *Clutchette v. Procunier* come into operation and the tests applied are more rigorous than those used gauging or guiding rehabilitory process.

In short, the appellants urge that this Court hold that the detailed and meticulous safeguards held appropriate in the defense of "core rights" be not required in every dispute arising between a prison inmate and the state correctional authority.

CONCLUSION

We submit that the district court should have abstained, that the social mail regulation does not present a substantial federal question and that the rules relating to paraprofessionals do not demonstrate any federal constitutional deprivation.

Dated, November 26, 1973.

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PROCUNIER, CORRECTIONS DIRECTOR, ET AL. *v.* MARTINEZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 72–1465. Argued December 3, 1973—Decided April 29, 1974

Appellees, prison inmates, brought this class action challenging prisoner mail censorship regulations issued by the Director of the California Department of Corrections and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. The mail censorship regulations, *inter alia*, proscribed inmate correspondence that "unduly complain[ed]," "magnif[ied] grievances," "express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate." The District Court held these regulations unconstitutional under the First Amendment, void for vagueness, and violative of the Fourteenth Amendment's guarantee of procedural due process, and it enjoined their continued enforcement. The court required that an inmate be notified of the rejection of correspondence and that the author of the correspondence be allowed to protest the decision and secure review by a prison official other than the original censor. The District Court also held that the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates abridged the right of access to the courts and enjoined its continued enforcement. Appellants contend that the District Court should have abstained from deciding the constitutionality of the mail censorship regulations. *Held:*

1. The District Court did not err in refusing to abstain from deciding the constitutionality of the mail censorship regulations. Pp. 400–404.

2. The censorship of direct personal correspondence involves incidental restrictions on the right to free speech of both prisoners and their correspondents and is justified if the following criteria are met: (1) it must further one or more of the important and substantial governmental interests of security, order, and the rehabilitation of inmates, and (2) it must be no greater than is necessary to further the legitimate governmental interest involved. Pp. 404–414.

3. Under this standard the invalidation of the mail censorship regulations by the District Court was correct. Pp. 415–416.

4. The decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards against arbitrariness or error, and the requirements specified by the District Court were not unduly burdensome. Pp. 417–419.

5. The ban against attorney-client interviews conducted by law students or legal paraprofessionals, which was not limited to prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous and which created an arbitrary distinction between law students employed by attorneys and those associated with law school programs (against whom the ban did not operate), constituted an unjustifiable restriction on the inmates' right of access to the courts. *Johnson* v. *Avery*, 393 U. S. 483. Pp. 419–422.

354 F. Supp. 1092, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined and in Part II of which DOUGLAS, J., joined, *post*, p. 422. DOUGLAS, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 428.

W. Eric Collins, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier*, Assistant Attorney General, and *Robert R. Granucci* and *Thomas A. Brady*, Deputy Attorneys General.

William Bennett Turner argued the cause for appellees. With him on the brief were *Mario Obledo, Sanford Jay Rosen, Anthony G. Amsterdam, Jack Greenberg, James M. Nabrit III, Stanley A. Bass, Lowell Johnston*, and *Alice Daniel*.*

*Briefs of *amici curiae* urging affirmance were filed by *William R. Fry* for the National Paralegal Institute, and by *Sheldon Krantz* and

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the constitutionality of certain regulations promulgated by appellant Procunier in his capacity as Director of the California Department of Corrections. Appellees brought a class action on behalf of themselves and all other inmates of penal institutions under the Department's jurisdiction to challenge the rules relating to censorship of prisoner mail and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. Pursuant to 28 U. S. C. § 2281 a three-judge United States District Court was convened to hear appellees' request for declaratory and injunctive relief. That court entered summary judgment enjoining continued enforcement of the rules in question and ordering appellants to submit new regulations for the court's approval. 354 F. Supp. 1092 (ND Cal. 1973). Appellants' first revisions resulted in counterproposals by appellees and a court order issued May 30, 1973, requiring further modification of the proposed rules. The second set of revised regulations was approved by the District Court on July 20, 1973, over appellees' objections. While the first proposed revisions of the Department's regulations were pending before the District Court, appellants brought this appeal to contest that court's decision holding the original regulations unconstitutional.

We noted probable jurisdiction. 412 U. S. 948 (1973). We affirm.

I

First we consider the constitutionality of the Director's Rules restricting the personal correspondence of prison inmates. Under these regulations, correspondence be-

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tween inmates of California penal institutions and persons other than licensed attorneys and holders of public office was censored for nonconformity to certain standards. Rule 2401 stated the Department's general premise that personal correspondence by prisoners is "a privilege, not a right . . . ." [1] More detailed regulations implemented the Department's policy. Rule 1201 directed inmates not to write letters in which they "unduly complain" or "magnify grievances." [2] Rule 1205 (d) defined as contraband writings "expressing inflammatory political, racial, religious or other views or beliefs . . . ." [3] Finally, Rule 2402 (8) provided that inmates "may not send or receive letters that pertain to criminal activity;

[1] Director's Rule 2401 provided:

"The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges."

[2] Director's Rule 1201 provided:

"INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."

It is undisputed that the phrases "unduly complain" and "magnify grievances" were applied to personal correspondence.

[3] Director's Rule 1205 provided:

"The following is contraband:

. . . . . .

"d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation."

Rule 1205 also provides that writings "not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision."

are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." [4]

Prison employees screened both incoming and outgoing personal mail for violations of these regulations. No further criteria were provided to help members of the mailroom staff decide whether a particular letter contravened any prison rule or policy. When a prison employee found a letter objectionable, he could take one or more of the following actions: (1) refuse to mail or deliver the letter and return it to the author; (2) submit a disciplinary report, which could lead to suspension of mail privileges or other sanctions; or (3) place a copy of the letter or a summary of its contents in the prisoner's file, where it might be a factor in determining the inmate's work and housing assignments and in setting a date for parole eligibility.

The District Court held that the regulations relating to prisoner mail authorized censorship of protected expression without adequate justification in violation of the First Amendment and that they were void for vagueness. The court also noted that the regulations failed to provide minimum procedural safeguards against error and arbitrariness in the censorship of inmate correspondence. Consequently, it enjoined their continued enforcement.

Appellants contended that the District Court should have abstained from deciding these questions. In that court appellants advanced no reason for abstention other than the assertion that the federal court should defer to the California courts on the basis of comity. The District Court properly rejected this suggestion, noting that the

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[4] At the time of appellees' amended complaint, Rule 2402 (8) included prohibitions against "prison gossip or discussion of other inmates." Before the first opinion of the District Court, these provisions were deleted, and the phrase "contain foreign matter" was substituted in their stead.

mere possibility that a state court might declare the prison regulations unconstitutional is no ground for abstention. *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971).

Appellants now contend that we should vacate the judgment and remand the case to the District Court with instructions to abstain on the basis of two arguments not presented to it. First, they contend that any vagueness challenge to an uninterpreted state statute or regulation is a proper case for abstention. According to appellants, "[t]he very statement by the district court that the regulations are vague constitutes a compelling reason for abstention." Brief for Appellants 8–9. As this Court made plain in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), however, not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention.[5] But we need not decide whether appellants' contention is controlled by the analysis in *Baggett*, for the short

[5] In *Baggett* the Court considered the constitutionality of loyalty oaths required of certain state employees as a condition of employment. For the purpose of applying the doctrine of abstention the Court distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. 377 U. S., at 376–377. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. *Id.*, at 378. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty." *Ibid.*

answer to their argument is that these regulations were neither challenged nor invalidated solely on the ground of vagueness. Appellees also asserted, and the District Court found, that the rules relating to prisoner mail permitted censorship of constitutionally protected expression without adequate justification. In light of the successful First Amendment attack on these regulations, the District Court's conclusion that they were also unconstitutionally vague hardly "constitutes a compelling reason for abstention."

As a second ground for abstention appellants rely on Cal. Penal Code § 2600 (4), which assures prisoners the right to receive books, magazines, and periodicals.[6] Although they did not advance this argument to the District Court, appellants now contend that the interpretation of the statute by the state courts and its application to the regulations governing prisoner mail might avoid or modify the constitutional questions decided below. Thus appellants seek to establish the essential prerequisite for abstention—"an uncertain issue of state

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[6] Cal. Penal Code § 2600 provides that "[a] sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced . . . ," and it allows for partial restoration of those rights by the California Adult Authority. The statute then declares, in pertinent part:

"This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

. . . . . .

"(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. . . ."

law," the resolution of which may eliminate or materially alter the federal constitutional question.[7] *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965). We are not persuaded.

A state court interpretation of § 2600 (4) would not avoid or substantially modify the constitutional question presented here. That statute does not contain any provision purporting to regulate censorship of personal correspondence. It only preserves the right of inmates to receive "newspapers, periodicals, and books" and authorizes prison officials to exclude "obscene publications or writings, and mail containing information concerning

[7] Appellants argue that the correctness of their abstention argument is demonstrated by the District Court's disposition of Count II of appellees' amended complaint. In Count II appellees challenged the mail regulations on the ground that their application to correspondence between inmates and attorneys contravened the Sixth and Fourteenth Amendments. Appellees later discovered that a case was then pending before the Supreme Court of California in which the application of the prison rules to attorney-client mail was being attacked under subsection (2) of § 2600, which provides:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

. . . . .

"(2) To correspond, confidentially, with any member of the State Bar, or holder of public office, provided that the prison authorities may open and inspect such mail to search for contraband."

The District Court did stay its hand, and the subsequent decision in *In re Jordan*, 7 Cal. 3d 930, 500 P. 2d 873 (1972) (holding that § 2600 (2) barred censorship of attorney-client correspondence), rendered Count II moot. This disposition of the claim relating to attorney-client mail is, however, quite irrelevant to appellants' contention that the District Court should have abstained from deciding whether the mail regulations are constitutional as they apply to personal mail. Subsection (2) of § 2600 speaks directly to the issue of censorship of attorney-client mail but says nothing at all about personal correspondence, and appellants have not informed us of any challenge to the censorship of personal mail presently pending in the state courts.

where, how, or from whom *such matter* may be obtained . . ." (emphasis added). And the plain meaning of the language is reinforced by recent legislative history. In 1972, a bill was introduced in the California Legislature to restrict censorship of personal correspondence by adding an entirely new subsection to § 2600. The legislature passed the bill, but it was vetoed by Governor Reagan. In light of this history, we think it plain that no reasonable interpretation of § 2600 (4) would avoid or modify the federal constitutional question decided below. Moreover, we are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment. *Zwickler* v. *Koota*, 389 U. S. 241, 252 (1967); *Baggett* v. *Bullitt*, 377 U. S., at 379. We therefore proceed to the merits.

A

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions.[8] More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons

[8] See Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 842–844 (1971).

in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.[9] Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect consti-

[9] They are also ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints. As one means of alleviating this problem, THE CHIEF JUSTICE has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances. 59 A. B. A. J. 1125, 1128 (1973). At the Third Circuit Judicial Conference meeting of October 15, 1973, at which the problem was addressed, suggestions also included (i) abstention where appropriate to avoid needless consideration of federal constitutional issues; and (ii) the use of federal magistrates who could be sent into penal institutions to conduct hearings and make findings of fact. We emphasize that we express no view as to the merit or validity of any particular proposal, but we do think it appropriate to indicate the necessity of prompt and thoughtful consideration by responsible federal and state authorities of this worsening situation.

tutional rights. *Johnson* v. *Avery*, 393 U. S. 483, 486 (1969). This is such a case. Although the District Court found the regulations relating to prisoner mail deficient in several respects, the first and principal basis for its decision was the constitutional command of the First Amendment, as applied to the States by the Fourteenth Amendment.[10]

The issue before us is the appropriate standard of review for prison regulations restricting freedom of speech. This Court has not previously addressed this question, and the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem. Some have maintained a hands-off posture in the face of constitutional challenges to censorship of prisoner mail. *E. g.*, *McCloskey* v. *Maryland*, 337 F. 2d 72 (CA4 1964); *Lee* v. *Tahash*, 352 F. 2d 970 (CA8 1965) (except insofar as mail censorship rules are applied to discriminate against a particular racial or religious group); *Krupnick* v. *Crouse*, 366 F. 2d 851 (CA10 1966); *Pope* v. *Daggett*, 350 F. 2d 296 (CA10 1965). Another has required only that censorship of personal correspondence not lack support "in any rational and constitutionally acceptable concept of a prison system." *Sostre* v. *McGinnis*, 442 F. 2d 178, 199 (CA2 1971), cert. denied, *sub nom. Oswald* v. *Sostre*, 405 U. S. 978 (1972). At the other extreme some courts have been willing to require demonstration of a "compelling state interest" to justify censorship of prisoner mail. *E. g.*, *Jackson* v. *Godwin*, 400 F. 2d 529

[10] Specifically, the District Court held that the regulations authorized restraint of lawful expression in violation of the First and Fourteenth Amendments, that they were fatally vague, and that they failed to provide minimum procedural safeguards against arbitrary or erroneous censorship of protected speech.

(CA5 1968) (decided on both equal protection and First Amendment grounds); *Morales* v. *Schmidt*, 340 F. Supp. 544 (WD Wis. 1972); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901 (SDNY 1970). Other courts phrase the standard in similarly demanding terms of "clear and present danger." *Wilkinson* v. *Skinner*, 462 F. 2d 670, 672–673 (CA2 1972). And there are various intermediate positions, most notably the view that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." *Carothers* v. *Follette*, 314 F. Supp. 1014, 1024 (SDNY 1970) (citations omitted). See also *Gates* v. *Collier*, 349 F. Supp. 881, 896 (ND Miss. 1972); *LeMon* v. *Zelker*, 358 F. Supp. 554 (SDNY 1972).

This array of disparate approaches and the absence of any generally accepted standard for testing the constitutionality of prisoner mail censorship regulations disserve both the competing interests at stake. On the one hand, the First Amendment interests implicated by censorship of inmate correspondence are given only haphazard and inconsistent protection. On the other, the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them and invites repetitive, piecemeal litigation on behalf of inmates. The result has been unnecessarily to perpetuate the involvement of the federal courts in affairs of prison administration. Our task is to formulate a standard of review for prisoner mail censorship that will be responsive to these concerns.

B

We begin our analysis of the proper standard of review for constitutional challenges to censorship of prisoner mail with a somewhat different premise from that taken